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COMPOSITION OF 'TORTS' IN GUAJIRO SOCIETY

By

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A discussion of the laws of a primitive society has first to surmount the difficulties of definition. How shall we differentiate law from custom, moral from legal duties and obligations in a society that has not codified its law, that lacks an easily recognized agency for making and enforcing them, and that cannot put forward a juristic philosophy? Are we justified in selecting certain acts which in our society fall subject to legal actions, and constructing a system of 'laws' out of them? In the literature on jurisprudence there is the tendency either to exclude law from primitive society altogether, to recognize in a vast array of reciprocal obligations and social censures law in the raw, or to set up criteria which allow for the existence of law in some societies and exclude it from others. For instance, analytical jurisprudence practically limits law to those rules which a fully organized state recognizes and enforces.[1] Obviously many primitive societies cannot satisfy such a strict concept of law for lack of the required social mechanism. Even Stammler, who rejects the concept that there can be no law without a state and who seeks law in custom, approaches the problem by asking: Is there an agency to make and enforce laws; is its purpose to ensure justice; does it determine in sovereign fashion who shall be subject to it; does it claim inviolability as long as it is in force? Likewise the historical and sociological schools would exclude law from some of the primitive societies.[2] Radcliffe-Brown, writing from an anthropological point of view, accepts Roscoe Pound's definition of law as 'social control through the systematic application of force of politically organized society,' and goes on to say that

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the field of law is 'coterminous with that of organized legal sanctions.' If there are no 'legal sanctions,' obligations are considered as matters of custom and conventions. He further suggests the use of 'public delicts' and 'private delicts' to classify violations of law which in our society would fall into the criminal and civil classes respectively.[3] Malinowski, justly calling attention to the fact that the field of law does not limit itself to prohibitions but also enjoins duties, extends the term to include binding obligations governing the intercourse of daily life and enforced by a 'specific mechanism inherent in the structure of society.'[4]

While it is not within the scope of this paper to examine critically the various concepts of what constitutes law, we may well ask if its existence in primitive society is dependent upon what one accepts as its definition. We are given the choice of admitting either that certain societies do not know law, or that law is present in all societies in the form of reciprocal obligations which include many phases of behavior which we are accustomed to call either custom or moral obligation. Still it may be granted that in any society there occur breaches of custom, which are recognized as trespass on the recognized rights of the individual and perhaps on the entire community, for the composition and rectification of which there are known and accepted acts whose nature is set and limited by precedent. These are in contrast to those breaches which may bring on the offender only social reprobation in a mild form through giving him a 'bad name.' The former ought to fall within the province of law as generally understood in our society, while the latter may properly be included in the field of morals.

Before proceeding with a description of Guajiro concepts of law and of custom it may be well to outline briefly the structure of their society. It is estimated that there are between ten and twenty thousand Guajiro inhabiting the peninsula that takes its name from them. Though most of the territory belongs to Colombia and a narrow coastal strip is within Venezuelan borders, the Guajiro live almost independently of both governments. The land is arid, lacking running water except in the hills of Macuire, where there are some springs. Most of

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the men speak some Spanish in addition to their native language. Some of them know how to read and write. They are almost entirely pastoral, possessing great herds of horses, asses, sheep, goats, and cattle. They have borrowed a great deal from the Europeans but they have also kept their own culture to a remarkable degree. As usual, native elements are most strongly present in the non-material phases of culture. Unfortunately they are not united or organized into a modern state, though against all foreigners they stand together as a unit. Authority is acquired by certain caciques through their wealth and membership in the 'casta,' the major social grouping in Guajiro society. Each casta claims a mythological origin and holds sovereignty over a well-defined territory. Many of these castas or social groupings are further subdivided. Each casta has its caciques whose function is chiefly to settle disputes and whose position is inherited, matrilineally. The oldest of them is allowed more authority, but generally it is the wealthiest man, and the one who can marshal more retainers, armed with rifles and revolvers, who is listened to with greater respect. There are further divisions in Guajiro society. At the top are the caciques and their families who are rich and powerful. The next group is composed of peons or retainers in the service of the upper stratum, and at the bottom are the 'slaves' who have been born in that condition or have been enslaved following an offense to some powerful group, and who can even be let out to work for planters in the sugar fields of Zulia. The life of the poor people has not changed much since early times. Polygamy is widely practised, as is also concubinage, by the wealthier men. Each wife lives in her own rancho and there awaits the occasional visit of her husband. The children inherit property and social affiliations through the mother. Disputes that arise within a casta are settled by arbiters chosen by the families of the litigants. Disputes inter-casta may be settled by arbitration if violence is not desirable. Generally the killing of an individual gives rise to armed action with an eventual composition by payment.

My informants attempted to demonstrate the difference be-

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671 tween law and custom in Guajiro society by a variety of illustrations. One of them said in effect:

574 626 671 If a cacique visits me and I fail to kill a sheep in honor of his visit and to feast him in accordance with the dignity of his rank and my wealth, I have broken a custom of my people. However, though I offend him by such negligence my guest may take no action to redress the wrong other than to inflict the same discourtesy on me if the opportunity should arise. He may seek neither redress in violence nor composition in payment. My only punishment may be the acquisition of a bad name among my people.

586 671 684 But if I visit one of my wives at her rancho and she fails to kill a sheep from her own flocks to feast me, refuses me her person, neglects to supply me with hammocks, saddle-bags, and other articles made by women, or refuses me shelter, she will have broken a 'law'; that is, she will have broken the marriage contract. In this case I may demand from her and her family payment or a divorce. In the latter case her family would have to return to me the bride-price plus any increase in the herds but less an amount considered fair for my having exercised sexual privileges over her, though I may demand even this if she marries again. In case her family refuses to adjust [626] the matter in accordance with our law I may appeal to my family for help in obtaining my just rights. I should be justified in having recourse to violence. However, the law is so well understood that it would not be necessary to resort to such drastic measures generally.[3]

671 [115] [177] These informants were acquainted to some extent with Colombian and Venezuelan laws and were attempting, no doubt, to classify their own customs in accordance with European practices. Nevertheless it is an indication that in their minds there does exist a class of offenses for which one may seek composition even through violence, and a class that is in the category of merely moral obligations though investigators may not always draw an equally fine distinction. [119] Simons, for example, in discussing Guajiro law speaks of injury to oneself as giving rise to a legal obligation for composition. 574 My informants, on the contrary, distinguished it from that class of wrongful acts. If a man cuts himself, his father and 626 father's relatives receive an expiatory offering. Had one of 672 my informants, the son of a rich cacique, cut himself he would 602 have given a small barrel of rum and five or more sheep to his

father's relatives who would eat the meat and drink the rum immediately, a feast to which the mother's relatives might be invited as a gesture of courtesy. The offering of rum and meat is voluntary, and even a friend may ask for something as an indication of deep personal interest in the welfare of the injured person. If the injured man makes no offering, no action is taken by anyone to make him do so, but he will acquire a 'bad name.' A Guajiro has a moral obligation to avoid shedding his own blood, but not a legal obligation. Since the father takes care of his son during his lifetime, this obligation is directed towards him and his relatives, but is extended to include any good friend.

Another example of the same distinction is the case where a son asks his father for a particular horse or object possessed by the latter, as a gift. The father is morally bound to grant the request, but there is no legal compulsion to do so. I gave a cacique a fine hunting knife which pleased him greatly. To my surprise his son was proudly wearing it the following day. On inquiring about it the cacique told me that his eldest son had asked for it. Had he refused to give it he would have been considered a bad father. The son inherits nothing from his father on the death of the latter, but while he is alive the son may beg anything within certain limits set by precedent. This moral obligation to give up a prized possession when asked for by one's sons is extended to include close friends.

Allowing the Guajiro to make their own distinctions, let us turn to a consideration of their 'laws.' The commission of certain acts, which in our society would give rise to criminal prosecution, in Guajiro society are considered matters to be settled by the parties concerned. Criminal law is practically non-existent. There is no body politic, properly speaking, that metes out punishment whether or not the injured party seeks redress, and social pressure can hardly be of any importance in a society that protects the individual through the instrument of family and caste membership. In only one case does there seem to be an approach to concerted social action. If an individual has caused his family much trouble and is incorrigible, if his family has been called upon to pay for his mis-

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deeds frequently, and fears that he may bring severe disaster on his relatives, he may be killed. It is interesting to know that the individual may not necessarily be evil-intentioned.

We are accustomed to think that for an act of trespass on the person or property the injured party can recover only if the act is considered to have been intentional or negligent.[6] Among the Guajiro there is no such qualification of a tort in order to allow legal action and to recognize legal liability. The act and the injury ensuing from it are the only considerations which have any importance.

Case I: Three boys, A, B, and C, close friends, were seated on a log in the order named. B held a knife in his hand. In the spirit of play A and C attempted to take it away from him. In the good-natured scuffle that ensued A was slashed across the thigh accidentally.

The families of A, the injured party, and of B were on friendly terms. B's family immediately offered payment for the hurt done to A. Each family chose an arbiter, men known for their knowledge of law and their fairness, who granted A's family payment commensurate with the social position of A and the ability of B's family to pay: 60 sheep, 1 bull, 1 ass, a gold necklace, a horse.

Case II: Cacique A killed Cacique B through the accidental discharge of a firearm. Their families belonged to the same casta, and both being anxious to avoid armed conflict B's family agreed to accept a property composition for the tort: 100 cows, 100 horses, 7 mules, 1,000 sheep.

Case III: Cacique A killed Cacique B in a quarrel. Both families being desirous of keeping the peace and both being members of the same casta, property composition was arranged.

This case would obviously fall within the class of crimes in our society and A would have been punished irrespective of the attitude of B's family. As a matter of fact, had B's family been low important or had it belonged to the peon or slave class, A's family may not have paid anything. On the other hand had A been a peon or slave, his family would have suffered extermination at the hands of B's relatives. A's family

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could not have paid the price in the first place, and besides B's family would have little to fear from them.

The father and maternal uncle of the slain man take the initiative in seeking payment which goes to the mother's family.

If A and B had been workmen or retainers of C, a cacique, and A's family could not have paid the price of composition, then C would have paid B's family and in compensation would have enslaved A and his family. Payment for killing a peon is 10 asses, 50 to 100 sheep, and 10 steers.

Case IV: A was working for B. In the course of the work through no fault of B, A was hurt. B paid A's family for the injury. A's family took care of A.

Case V: A and B were working for C. Through accident B hurt A. B's family had to settle the injury with A's family. Had A been hurt in the course of the work without B acting as the instrument, then C, the employer, would have had to pay.

This case is similar to the one described by Simons. If A lends a horse to B and B is hurt through the instrumentality of the horse, A has to pay. If A gives rum to B and B injures C, A is held responsible.

Case VI: A wants to marry B. B or B's family reject his suit. A goes to B's rancho at night and commits suicide there B's family has to pay A's family for the death of A, B being considered as the direct instrument that caused A's death.

Case VII: A injures or kills B, caught *in flagrante delicto* with A's wife. A has to pay B's family a price minus an amount considered fair value for the sexual privilege that B exercised on A's wife.

These illustrations point to the absolute nature of Guajiro law. No extenuating circumstances are allowed to enter into settlement of cases of battery or other trespass on the rights of an individual. The case is different in so far as public sympathy and moral censure or approbation are concerned. Furthermore, society as a whole takes no action in righting wrongs. The family of the injured person must seek composition, and if it is not powerful enough to demand a high price it has to be satisfied with a smaller one. Conversely, there is

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672 family responsibility for the acts of one of its members. If
628 there is no property composition for a tort committed and the injured family has recourse to arms, the revenge that it may take is limited by precedent. If the family is very powerful
[626] it may dispense with that, but public moral reprobation is a strong barrier to excesses.

NOTES

121 1. J. Austin and T. E. Holland restrict the term Law to those rules which a fully organized state recognizes and enforces. I.e., T. E. Holland: 'A law, in the proper sense of the term, is a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities, is that which is paramount in a political society.' (See Bibliography.)

2. Rivet, Durkheim, Hartland, and Hobhouse express this position.

3. Radcliffe-Brown, 202.

4. See Malinowski in Hoghin.

114 5. From my field notes gathered in 1935. The Columbia University—University Museum Guajiro Expedition spent three months in the peninsula making an ethnological and archaeological survey. The other members of the expedition were: Dr. Paul Kirchhoff; Mr. Lewis Korn and Mrs. Gwyneth Browne Harrington, archaeologists; Miss Lydia C. du Pont, photographer; Señor Gregorio Hernandez de Alba, a Colombian student.

6. See Bohlen.

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